THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2005-0092, Jill Kardulas v. Nestlenook Inn, Inc. & a., the court on October 25, 2005, issued the following order:

The plaintiff, Jill Kardulas, appeals an order of the trial court granting the motion for summary judgment filed by the defendants, Nestlenook Inn, Inc., A Victorian Afternoon At Nestlenook Farm 1990, Inc., Nestlenook Farm On The River, Inc. and Nestlenook Farm Resort, Inc. See RSA 491:8-a (1997). We affirm.

In reviewing the trial court's grant of summary judgment, we consider the affidavits and all inferences properly drawn from them, in the light most favorable to the non-moving party. Marikar v. Peerless Ins. Co., 151 N.H. 395, 397 (2004). If there is no genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law, the grant of summary judgment is proper. Id. We review the trial court's application of the law to the facts de novo. Id.

The plaintiff first argues that the trial court erred in granting the defendants' motion for summary judgment because it was unaccompanied by an affidavit when originally filed and because when the defendants subsequently filed an affidavit, the trial court acted before receiving the plaintiff's timely filed counter-affidavit. Assuming without deciding that the trial court acted prematurely in granting the motion for summary judgment, the plaintiff's counter-affidavit was before the court when it considered and denied her motion for reconsideration.

Moreover, on appeal, the entire record is before us. The issue presented is a question of law. We need not remand this case for any alleged procedural error because there are no factual issues that we cannot resolve. See J.E.D. Associates, Inc. v. Town of Atkinson, 121 N.H. 581, 584 (1981). Our review standard is the same as that of the trial court. Accordingly, the alleged failure to consider the affidavit is harmless.

The plaintiff sought recovery under two theories. The first was based on negligence, in which the plaintiff claimed that she was injured while ice-skating on the defendants' lake. A defendant may not be held liable for negligent conduct that is not outside the range of ordinary activity involved in a sport. Allen v. Dover Co-Recreational Softball League, 148 N.H. 407, 418 (2002). The plaintiff's claim was based on an injury that allegedly occurred "after the tip of

her ice skate became stuck in a defect in the skating surface." The plaintiff's writ on its face contains no allegation of conduct that is outside the range of ordinary activity involved in ice skating on an outdoor skating surface. Nor do any of the pleadings subsequently filed meet that standard. The plaintiff's allegation that the defendants represented that the ice was "meticulously maintained" does not alter our conclusion. Accordingly, we find no error in the trial court's entry of summary judgment on the first count.

We reach the same conclusion with respect to the second count of the plaintiff's writ, which asserted a violation of the Consumer Protection Act. See RSA 358-A:2 (Supp. 2004). The plaintiff alleged that the defendants represented that the ice skating park was "meticulously maintained" and that this statement was a misrepresentation that violated RSA 358-A:2. This allegation, however, does not meet the standard that we have previously articulated when determining whether a commercial action is covered by the Act. See Milford Lumber Co. v. RCB Realty, 147 N.H. 15, 17 (2001) ("The objectionable conduct must attain a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce.").

Affirmed.

NADEAU, DALIANIS and DUGGAN, JJ., concurred.

Eileen Fox,
Clerk